No. 85-1231

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

HELEN PASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Armed Forces Survivor Benefit Plan Act, 10 U.S.C. 1447 *et seq.*, entitled her to notice of her husband's decision not to participate in the Survivor Benefit Plan. She also contends that the Claims Court had jurisdiction over her claim for benefits.

1. Petitioner's husband, Major Ramon Passaro, served in the United States Army from September 15, 1948 until his retirement on November 1, 1968. At that time, he elected not to participate in the Retired Serviceman's Family Protection Plan, choosing instead to receive full retired pay. Pet. App. 3; Pet. 6.

Subsequently, on September 21, 1972, Congress enacted the Armed Forces Survivor Benefit Plan Act, Pub. L. No. 92-425, 86 Stat. 706, 10 U.S.C. 1447 *et seq.* This Act creates

an annuity program for the survivors of servicemen known as the Survivor Benefit Plan (Plan). The Plan, which replaced the Retired Serviceman's Family Protection Plan, automatically covers the survivors of servicemen who retire on or after the effective date of the legislation (September 21, 1972) unless the serviceman affirmatively declines to participate in the Plan. 10 U.S.C. 1448(a). If the serviceman declines to participate, "that person's spouse shall be notified of that election." 10 U.S.C. 1448(a)(3)(A).

Section 3(b) of the Act also provided that a serviceman who was entitled to retired or retainer pay as of September 21, 1972 could elect to participate in the Plan provided that he exercised that right within the first anniversary of the effective date of the legislation. 86 Stat. 711; see 10 U.S.C. 1448 note. The Army notified Major Passaro of his options and, on September 4, 1973, he elected in writing not to participate in the Plan (Pet. App. 4-5). The Army did not inform petitioner of her husband's decision.

Major Passaro died on October 7, 1976 (Pet. 6). Four years later, petitioner inquired about survivor benefits. The Army informed her that her husband had elected to receive full retired pay rather than to provide her with a survivor's annuity through reduced retired pay (Pet. App. 5). On November 16, 1981, petitioner filed suit in the Claims Court, contending that she was entitled to an annuity at the maximum benefit level under the Plan despite her husband's decision not to participate. She argued that 10 U.S.C. 1448(a) required the Army to notify her of her husband's decision and that its failure to do so entitled her to benefits. See Pet. App. 29-30.

The Claims Court partially granted petitioner's motion for summary judgment (Pet. App. 29-52). It acknowledged that Section 3(b) does not contain a spousal notification provision but concluded that the Section implicitly incorporated the notification requirement of 10 U.S.C.

1448(a) (Pet. App. 36, 60). The court ruled that a retiree's election not to participate in the Plan has no effect until the government notified the retiree's spouse. The court also held that it could employ "equitable procedures to retroactively elect a pre-SBP retiree into the plan in order to award his widow monetary compensation," stating further that "[w]hether the case at bar presents such inequities as to require the court to exercise these procedures must be determined from the evidence adduced at trial." Pet. App. 61.

The government moved for reconsideration, contending that the Claims Court was without jurisdiction and, in the alternative, that petitioner had failed to state a claim upon which relief could be granted. The Claims Court held that petitioner had stated a claim within the court's jurisdiction and that she was entitled to recover accrued and future annuity benefits under the Plan. Pet. App. 13-28.[1]

The United States Court of Appeals for the Federal Circuit vacated the decision of the Claims Court and remanded the case with instructions to dismiss for lack of jurisdiction (Pet. App. 1-12). The court of appeals concluded that "[t]he Claims Court reached its judgment by writing into the Act a notice requirement it does not have" (*id.* at 6). The court of appeals also rejected the Claims Court's conclusion that it had equity jurisdiction, stating that "[a]bsent a presently due money claim, * * * the Claims Court had no jurisdiction in the present case to fashion what it described as equitable relief" (*id.* at 11).

2. The court of appeals' decision is correct. It does not conflict with any decision of this Court or any other court of appeals, and it presents no issue of sufficient importance to merit this Court's review.

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[1]The court failed to explain why a trial was no longer required to determine whether benefits should be awarded.

a. Petitioner errs in contending that the Army was required to notify her of her husband's decision against participation in the government annuity program. The Armed Forces Survivor Benefit Plan Act does not require the Army to notify spouses of pre-Plan retirees that the retiree has declined to exercise his option to participate in the Plan. The spousal notification provisions of 10 U.S.C. 1448(a), by their plain terms, apply only to the decisions of servicemen who retire after the effective date of the Act. Section 1448(a)'s spousal notification provisions demonstrate, as the court of appeals correctly held, that "Congress knew how to say whether a spouse should be notified of a nonelection of survivor benefits by the military member" (Pet. App. 6).[2]

Furthermore, nothing in the legislative history indicates that Congress intended to require notice to the spouses of pre-Plan retirees. Indeed, the opposite is true. Both the House and Senate reports point out that notice is required in cases where a serviceman about to retire elects against participation in the Plan. See H.R. Rep. 92-481, 92d Cong., 1st Sess. 8-9 (1971); S. Rep. 92-1089, 92d Cong., 2d Sess. 50-51 (1972). But neither report makes any mention of a notice requirement in discussing the provisions of the Act applicable to servicemen who retired prior to the effective date of the Act. See H.R. Rep. 92-481, *supra,* at 11-12; S. Rep. 92-1089, *supra,* at 56-57. Additionally, the Army adopted its policy concerning notice to spouses of pre-Plan retirees in 1972. Although Congress has amended the Act several times since then, Congress has never seen fit to change the notice requirements. Pet. App. 3. Accordingly, the court of appeals properly gave weight to the Army's

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[2]Likewise, there is no provision in the statute suggesting that the United States could be held liable in money damages for the Army's failure to notify a pre-Plan retiree's spouse of his decision not to participate in the Plan. See page 5, *infra*.

longstanding interpretation. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).[3]

b. Petitioner also challenges the court of appeals' holding that the Claims Court had no jurisdiction over her claim. She states (Pet. 9) that this result "not only denies [her] any remedy for governmental wrongdoing, but also is contrary to *United States* v. *Testan*, 424 U.S. 392 (1976)."

The court of appeals correctly recognized that the Claims Court has no jurisdiction in the absence of a statutory right to relief. The court of appeals' decision is completely consistent with *Testan*, which holds that a claimant may assert a claim for money damages in the Claims Court only if a federal statute " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " 424 U.S. at 400 (quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). As we have discussed above, the Act here cannot "fairly be interpreted" to provide a remedy to a pre-Plan retiree's spouse who was not informed of her husband's decision not to participate in the Plan.

Finally, it should be remembered that the "remedy" petitioner seeks is, in reality, a windfall. Petitioner's husband could have chosen to provide her with a survivor's annuity,

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[3]Petitioner argues (Pet. 10) that the decision below is contrary to *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551 (1979). Presumably, petitioner is relying on the Court's statement in *Teamsters*, 439 U.S. at 566 n.20, later quoted in *Southeastern Community College*, 442 U.S. at 411, that the deference paid to an agency's interpretation is "constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." In this case, however, the Army's interpretation of the Plan is fully consistent with both the plain language and the legislative history of the statute.

but, if he had, his retired benefits would have been reduced. He chose instead to receive full retired pay. It seems likely that petitioner benefitted, at least indirectly, from that choice. Even if petitioner's husband had elected to participate in the Plan, however, there is absolutely nothing in the record to indicate that he would have participated at the maximum level. Yet petitioner now seeks the maximum annuity. Surely Congress did not intend that result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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